8 1

Supreme Court, U.S.
FILED
06-948 JAN 08 2007
OFFICE OF THE CLERK

(1)

No. 06-___

IN THE

# Supreme Court of the United States

BERTRAM SACKS,

*Petitioner,*

v.

OFFICE OF FOREIGN ASSETS CONTROL, United States Department of the Treasury; R. RICHARD NEWCOMB, Director, Office of Foreign Assets Control,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## PETITION FOR A WRIT OF CERTIORARI

Donald B. Scaramastra
*Counsel of Record*
Gary D. Swearingen
GARVEY SCHUBERT BARER
Eighteenth Floor
1191 Second Avenue
Seattle, Washington 98101-2939
(206) 464-3939

January 8, 2007

## QUESTIONS PRESENTED

On several occasions before the Second Gulf War, Petitioner Bertram Sacks transported medicine to civilian hospitals in Iraq for use by children and other civilian patients. Mr. Sacks did so with several other members of an unincorporated association known as Voices in the Wilderness.

At the time, the federal Office of Foreign Assets Control and its director, Richard Newcomb (collectively referred to as the "agency") had prohibited travel to Iraq. The agency had also banned unlicensed humanitarian exports of food and medicine to Iraqi civilians. It did so even though UN Security Council Resolutions, Presidential Executive Orders, and federal statutes pertaining to Iraq did not authorize an absolute embargo on humanitarian exports, an embargo that would have violated international law.

In response to Mr. Sacks's actions, the agency sent Mr. Sacks and Voices a joint prepenalty notice that charged: "you and Voices in the Wilderness ('VW') have engaged in certain prohibited transactions" that "concern your and VW's exportation of donated goods, including medical supplies and toys, to Iraq." When Mr. Sacks admitted to exporting medicine, the agency sent him a penalty notice: "You admitted the [Prepenalty] Notice's allegation in Count 6 that you exported goods to Iraq absent prior OFAC approval." Based on this admission, the agency found that Mr. Sacks had "violated the Regulations as alleged in Count 6 of the Notice" and imposed a $10,000 civil penalty. The agency fined Voices separately for exporting medicine.

The Ninth Circuit held that notwithstanding these penalties, Mr. Sacks lacked standing to challenge the agency's prohibition of humanitarian exports. The Ninth Circuit recognized that Mr. Sacks had standing to challenge the agency's travel ban, but held that Congressional statutes authorized such a ban, even if it had the intended effect of preventing humanitarian aid from reaching Iraqi children and other civilians.

Mr. Sacks now petitions for a writ of certiorari. The petition raises two questions:

1. Does Mr. Sacks have standing to challenge the agency's civil penalty and its direct or indirect restrictions on humanitarian exports of food and medicine to Iraqi civilians and children?

2. Are the agency's direct and indirect restrictions on humanitarian exports of food and medicine to Iraqi civilians and children, through a travel ban or otherwise, lawful and enforceable as a matter of both international and domestic U.S. law?

## TABLE OF CONTENTS


Page

INTRODUCTION AND BACKGROUND ..... 1
STATEMENT OF THE CASE ..... 8
REASONS FOR GRANTING THE WRIT ..... 14
I. The Ninth Circuit's Erroneous Ruling on Standing Will Prevent Judicial Scrutiny of Regulations like Those at Issue Here ..... 15
A. Injury in Fact ..... 16
B. Causation and Redressability ..... 20
II. A Prohibition on Humanitarian Donations Violates International Law That Congress Has Not Abrogated ..... 22
A. International Law Forbids the Deliberate, Mass Starvation of Children and Other Civilians ..... 23
B. The UN Participation Act Does Not Authorize an Embargo on Humanitarian Aid ..... 28
C. The Iraq Sanctions Act of 1990 Does Not Authorize an Embargo on Humanitarian Aid ..... 29
III. Conclusion ..... 29

## TABLE OF CITED AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

U.S. CONST. Art. 6 ..... 26

CASES

*Babbitt v. United Farm Workers*, 442 U.S. 289 (1979) ..... 17, 18

*Doe v. Bolton*, 410 U.S. 179 (1973) ..... 19

*Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) ..... 21

*Heckler v. Mathews*, 465 U.S. 728 (1984) ..... 16

*INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) ..... 27

*Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) ..... 16, 22

*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) ..... 15, 20

*Murray v. Charming Betsy*, 6 U.S. 64 (1804) ..... 27

*O'Shea v. Littleton*, 414 U.S. 488 (1974) ..... 18

*Office of Foreign Assets Control v. Voices in the Wilderness*, No. 03-1356 (JDB) (D.D.C. July 9, 2004), at 2 ..... 12

*Pennell v. City of San Jose*, 485 U.S. 1 (1988) ..... 16, 19

*Poe v. Ullman*, 367 U.S. 497 (1961) ..... 18

REP. NO. 99-2, pt. I, *reprinted in* 28 I.L.M. 754, 762 (1989). ..... 25

*:cks v. Office of Foreign Assets Control*, 466 F.3d 764, 2006 U.S. App. LEXIS 25294 (9th Cir. 2006) ..... xi

*mon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) ..... 22

*zel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) ..... 15, 21

*:e Paquete-Habana*, 175 U.S. 677, 700 (1900) ..... 23

*rth v. Seldin*, 422 U.S. 490 (1975) ..... 16

*:inberger v. Rossi*, 456 U.S. 25 (1982) ..... 27

*hitney v. Robertson*, 124 U.S. 190, 194 (1888) ..... 27

*ungstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) ..... 27

**'ATUTES AND LEGISLATIVE MATERIALS**

U.S.C. § 287c ..... xi, 28

U.S.C. § 1254(1) ..... x

U.S.C. § 1331 ..... 12

U.S.C. § 1337 ..... 12

U.S.C. § 1346(a)(2) ..... 12

U.S.C. § 2461(a) ..... 12

ternational Emergency Economic Powers Act ("IEEPA") § 203(b) ..... 26

aq Sanctions Act, Pub. L. 101-513, § 586C ..... xi, 8, 9, 29

*Iraq: Are Sanctions Collapsing?: Joint Hearing before the Senate Committee on Foreign Relations and the Senate Committee on Energy and Natural Resources*, 105th Cong., S. Hrg. 105-650, at 59-60 (1998) ..... 7

REGULATORY MATERIALS

31 CFR § 575 ..... 9

31 CFR § 575.205 ..... xi, 9

31 CFR § 575.207 ..... xi, 10

56 Fed. Reg. 2113 (Jan. 18, 1991) ..... 9, 29

Executive Order 12,722, 55 F.R. 31803 (Aug. 2, 1990), reprinted in 50 U.S.C. § 1701 note ..... xi

Executive Order 12,724 § 2(b), 55 F.R. 33089 (Aug. 9, 1990), reprinted in 50 U.S.C. § 1701 note ..... xi

Executive Order 13350, 69 Fed. Reg. 46055 (July 30, 2004) ..... 23

COURT RULES

Fed. R. Civ. P. 12(b)(6) ..... 12

TREATIES AND OTHER INTERNATIONAL MATERIALS

Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 ..... xi, 25

Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. ..... xi, 25

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 ..... xi

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *done on* May 25, 2000, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000) ..... 26

Optional Protocol to the Convention on the Rights of the Child, United States Dept. of State, Treaties in Force (2006), at 389-90. ..... 26

UN Security Council Resolution 661, U.N. SCOR, 2933rd mtg, U.N. Doc. S/RES/661 (1990) ..... xi, 2, 8

Universal Declaration of Human Rights, GA Res. 217A (III), U.N. Doc A/810 at 71 (1948) ..... xi, 24

Vienna Convention on the Law of Treaties, *done on* May 23, 1969, art. 53, 1155 U.N.T.S. 331 ..... 23

SECONDARY SOURCES

Alberto Ascherio, et al., *The Effect of the Gulf War on Infant and Child Mortality in Iraq*, 327 NEW ENG. J. MED. at 931 (Sept. 24, 1992) ..... 4

Barton Gellman, *Allied Air War Struck Broadly in Iraq; Officials Acknowledge Strategy Went Beyond Purely Military Targets*, THE WASHINGTON POST, June 23, 1991, at A1 ..... 1, 3

CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.5, at 879 (2004 supp. ..... 21

*Iraq Water Treatment Vulnerabilities*, Defense Intelligence Agency (Jan. 18, 1991) ..... 2

Leon Eisenberg, *The Sleep of Reason Produces Monsters -- Human Costs of Economic Sanctions*, 336 NEW ENGLAND JOURNAL OF MEDICINE, at 1248-50 (April 24, 1997) ..... 4

MARC BOSSUYT, THE ADVERSE CONSEQUENCES OF ECONOMIC SANCTIONS ON THE ENJOYMENT OF HUMAN RIGHTS (2000) ¶ 71 ..... 7

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987). ..... 27

The Harvard Study Team, *The Effect of the Gulf Crisis On the Children of Iraq*, 325 New Eng. J. Med. 977-80 (1991) ..... 4

U.S. Department of State Dispatch, Vol. 2, No. 21, May 27, 1991 ..... 3

UNICEF, THE SITUATION OF CHILDREN IN IRAQ, at 11 (2003) ..... 6

## Opinions and Orders Below

The opinion of the United States Court of Appeals for the Ninth Circuit is published at *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 2006 U.S. App. LEXIS 25294 (9th Cir. 2006) and is reprinted in the appendix. The opinion of the United States District Court for the Western District of Washington is unpublished and is reprinted in the appendix.

## BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals issued its opinion on October 10, 2006. Neither side petitioned for rehearing or for hearing by the Ninth Circuit *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## AUTHORITIES INVOLVED

The following are the principal constitutional provisions, treaties, UN Security Council Resolutions, statutes, regulations, and executive orders that are involved in the case. Excerpts from these materials are set forth in the appendix.

United Nations Participation Act, 22 U.S.C. § 287c.

Iraq Sanctions Act, Pub. L. 101-513, § 586C.

Executive Order 12,722, 55 F.R. 31803 (Aug. 2, 1990), reprinted in 50 U.S.C. § 1701 note.

Executive Order 12,724 § 2(b), 55 F.R. 33089 (Aug. 9, 1990), reprinted in 50 U.S.C. § 1701 note.

31 CFR § 575.205.

31 CFR § 575.207.

UN Security Council Resolution 661, U.N. SCOR, 2933rd mtg, U.N. Doc. S/RES/661 (1990).

Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277.

Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Universal Declaration of Human Rights, GA Res. 217A (III), U.N. Doc A/810 at 71 (1948).

## INTRODUCTION AND BACKGROUND

In 1990, the United States began a years-long military and economic campaign that targeted Iraq's civilian population, contributing to the mass deaths of children and other civilians there. The regulations at issue here, and under which petitioner Bertram Sacks was fined, were part of that effort.

Bombing worked hand in hand with an embargo, exacerbating its effect. This was intended, one military planner explained to the Washington Post:

> The worst civilian suffering, senior [American] officers say, has resulted not from bombs that went astray but from precision-guided weapons that hit exactly where they were aimed --- at electrical plants, oil refineries and transportation networks. ..."People say, 'You didn't recognize that it was going to have an effect on water or sewage,'" said the planning officer. "Well, what were we trying to do with [United Nations-approved economic] sanctions -- help out the Iraqi people? No. What we were doing with the attacks on infrastructure was to accelerate the effect of the sanctions."[1]

Before the First Gulf War, U.S. officials were aware of the potential consequences of targeting Iraq's infrastructure. In January 1991, just as the First Gulf War was beginning and six months into the embargo, the Pentagon's Defense Intelligence Agency projected that the embargo would cause Iraq's ability to provide clean drinking water to collapse within six months. Chemicals for water treatment, the agency noted, were "depleted or nearing depletion," chlorine supplies were "critically low,"

---

[1] Barton Gellman, *Allied Air War Struck Broadly in Iraq; Officials Acknowledge Strategy Went Beyond Purely Military Targets*, THE WASHINGTON POST, June 23, 1991, at A1.

the main chlorine-production plants had been shut down, and industries such as pharmaceuticals and food processing were already becoming incapacitated. "Unless the water is purified with chlorine," the agency concluded, "epidemics of such diseases as cholera, hepatitis, and typhoid could occur."[2]

After the war, the United Nations Secretary- General dispatched a mission to assess the situation in Iraq.[3] The mission reported that the ware had "wrought near-apocalyptic results," that the bombing had relegated Iraq "to a pre-industrial age," and warned that Iraq could face "epidemic and famine if massive life-supporting needs are not rapidly met."[4] The report called for an immediate end to the embargo on imports of food and other essential supplies to prevent "imminent catastrophe."[5]

The U.S. embargo's initial goal was to force an Iraqi withdrawal from Kuwait. This was consistent with Security Resolution 661, which called for sanctions "to secure compliance with paragraph 2 of resolution 660," which in turn "demand[ed] that Iraq withdraw immediately and unconditionally " from Kuwait.[6]

But after the First Gulf War ended, U.S. officials expanded the embargo's objective had expanded to encompass the removal of Saddam Hussein from power. In a May 22, 1991 written statement prepared for delivery to the Subcommittee on Foreign Operations of the House Appropriations Committee, then-Secretary of State James Baker announced: "[W]e will act with others to continue to

---

[2] *Iraq Water Treatment Vulnerabilities*, Defense Intelligence Agency (Jan. 18, 1991).

[3] *See* Amended Complaint ¶ 8. A copy of the report is available on the UN's website at http://www.un.org/Depts/oip/background/reports/s22366.pdf.

[4] *Id.*

[5] *Id.*

[6] S.C. Res. 661, U.N. SCOR, 2933rd mtg, U.N. Doc. S/RES/661 (1990), *available on-line at* http://www.un.org/Docs/scres/1990/scres90.htm, *last visited 4/8/05.*

isolate Saddam's regime. ... That means maintaining UN sanctions in place so long as Saddam remains in power."[7]

Military planners explained the logic underlying this decision:

> Col. John A. Warden III, deputy director of strategy, doctrine and plans for the Air Force, agreed that one purpose of destroying Iraq's electrical grid was that "you have imposed a long-term problem on the leadership that it has to deal with sometime."
>
> "Saddam Hussein cannot restore his own electricity," he said. "He needs help. If there are political objectives that the U.N. coalition has, it can say, 'Saddam, when you agree to do these things, we will allow people to come in and fix your electricity.' It gives us long-term leverage."
>
> Said another Air Force planner: "Big picture, we wanted to let people know, 'Get rid of this guy and we'll be more than happy to assist in rebuilding. We're not going to tolerate Saddam Hussein or his regime. Fix that, and we'll fix your electricity.'"[8]

But the embargo remained in effect. As expected and intended, its post-war continuation prevented Iraq from rebuilding water and sewage treatment plants – and the electric-generating plants used to power them – that were destroyed during the First Gulf War.[9] This, and the resulting lack of potable water, had widespread lethal consequences that were visited with particular ferocity on

---

[7] U.S. Department of State Dispatch, Vol. 2, No. 21, May 27, 1991.

[8] Barton Gellman, *Allied Air War Struck Broadly in Iraq; Officials Acknowledge Strategy Went Beyond Purely Military Targets*, THE WASHINGTON POST, June 23, 1991, at A1.

[9] Amended Complaint ¶ 18.

children under five.[10] In 1992 the New England Journal of Medicine reported:

> strong evidence that the Gulf war and trade sanctions caused a threefold increase in mortality among Iraqi children under five years of age. We estimate that an excess of more that 46,900 children died between January and August 1991.[11]

In 1997, the same journal reported:

> The destruction of the country's power plants had brought its entire system of water purification and distribution to a halt, leading to epidemics of cholera, typhoid fever, and gastroenteritis, particularly among children. Mortality rates doubled or tripled among children admitted to hospitals in Baghdad and Basra. Cases of marasmus appeared for the first time in decades. The team observed "suffering of tragic proportions.... [with children] dying of preventable diseases and starvation." Although the allied bombing had caused few civilian casualties, the destruction of the infrastructure resulted in devastating long-term effects on health.[12]

Since 1992, sanctions have contributed to the deaths of three to six thousand children under five in Iraq every

---

[10] *Id.*

[11] Alberto Ascherio, et al., *The Effect of the Gulf War on Infant and Child Mortality in Iraq*, 327 NEW ENG. J. MED. at 931 (Sept. 24, 1992); *see also* Amended Complaint ¶ 19.

[12] Leon Eisenberg, *The Sleep of Reason Produces Monsters -- Human Costs of Economic Sanctions*, 336 NEW ENGLAND JOURNAL OF MEDICINE, at 1248-50 (April 24, 1997) (citing The Harvard Study Team, *The Effect of the Gulf Crisis On the Children of Iraq*, 325 New Eng. J. Med. 977-80 (1991).

month.[13] According to UNICEF's Director, sanctions reversed a decades-long decline in infant mortality in Iraq.[14] She relied upon UNICEF reports that between 1991 and 1998, this reversal contributed to the deaths of a half million children under five.

Page 3 of a 2000 UNICEF report entitled "UNICEF in Iraq" warned: "Mounting evidence shows that the sanctions are having a devastating humanitarian impact on Iraq."[15] UNICEF quoted a 1997 report by the UN Human Rights Committee, which lamented that "the effect of sanctions and blockades has been to cause suffering and death in Iraq, especially to children."[16]

In 2003, UNICEF published another report, entitled "The Situation of Children in Iraq.[17] Page 13 of that report stated that a country like Iraq, which had an infant mortality rate of 40-60 deaths per 1,000 live births in 1990, was expected to achieve a rate of 20-30 by 2003.[18] Instead, the infant mortality rate in southern and central Iraq climbed to 107 deaths per 1,000 live births by 1999.[19] There was a similar upswing in the under-five mortality rate, which nearly tripled between 1985 and 1999.[20] UNICEF attributed the increase in childhood mortality in Iraq to economic sanctions.[21]

The "oil-for-food" program failed to eliminate widespread embargo-related infant and child mortality[22] and the first two directors of the oil-for-food program resigned from the UN in protest.[23] The first, Denis Halliday, explained:

---

[13] Amended Complaint ¶ 19.
[14] Amended Complaint ¶ 21.
[15] Amended Complaint ¶ 20.
[16] *Id.*
[17] Amended Complaint ¶ 22; *see* http://unicef.org/publications/index_4439.html, *last visited 4/8/05.*
[18] Amended Complaint ¶ 22.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Amended Complaint ¶ 26.
[23] Amended Complaint ¶ 27.

> Malnutrition is running at about 30 percent for children under 5 years old. In terms of mortality, probably 5 or 6 thousand children are dying per month. This is directly attributable to the impact of sanctions, which have caused the breakdown of the clean water system, health facilities and all the things that young children require. . . . I do not want to administer a program that results in these kinds of figures.[24]

He later warned: "We are in the process of destroying an entire society. It is as simple and terrifying as that."[25]

The second director, Hans von Sponeck, resigned after he "became aware that I was associated with a policy of implementing an oil-for-food program that could not possibly meet the needs of the Iraqi people."[26] "If we continue this policy when we fully recognize its consequences," he warned, "we move toward genocide."[27]

UNICEF reports confirm that the oil-for-food program "did not greatly improve conditions for most Iraqis. This is partly because revenue has not been sufficient to comprehensively rehabilitate the country's infrastructure."[28] UNICEF's 2003 report, cited above, concluded: "since the introduction of the Oil for Food Programme, the nutritional status of children has not improved. One in five children in the south and centre of Iraq remain so malnourished that they need special feeding, and child sickness rates continue to be alarmingly high."[29]

---

[24] *Id.*

[25] *Id.*

[26] Amended Complaint ¶ 28.

[27] Amended Complaint ¶ 28.

[28] Amended Complaint ¶ 29.

[29] Amended Complaint ¶ 29; *see* UNICEF, THE SITUATION OF CHILDREN IN IRAQ, at 11 (2003).

Meanwhile, a 2000 working paper for the Office of the UN High Commissioner for Human Rights concluded, "The sanctions regime against Iraq is unequivocally illegal under existing international humanitarian law and human rights law. Some would go as far as making a charge of genocide."[30]

Many in government not only anticipated these consequences, they were aware or accepted them as they unfolded. In 1996, for example, then-UN Ambassador Madeleine Albright was asked: "We have heard that a half million children have died. I mean, that's more children than died in Hiroshima. ... [I]s the price worth it?"[31] She responded, "I think this is a very hard choice, but the price -- we think the price is worth it."[32] Two years later, in a prepared statement submitted to a May 21, 1998 joint hearing before the Senate Committees on Foreign Relations and on Energy and Natural Resources, Senator Larry Craig insisted: "The use of food as a weapon is wrong. Starving populations into submission is poor foreign policy."[33]

In response to this, Mr. Sacks transported medicine to children and other civilians in Iraq. He expected to incur the ire of the authorities by doing so. This, he expected and hoped, would put the U.S. embargo before the judiciary of the United States, where the rule of law prevails. And there he proposed to ask the question: Is the deliberate targeting of children and civilian populations – with resulting mass

---

[30] MARC BOSSUYT, THE ADVERSE CONSEQUENCES OF ECONOMIC SANCTIONS ON THE ENJOYMENT OF HUMAN RIGHTS (2000) ¶ 71. This report is available on-line at www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/c56876817262a5b2c125695e0050656e/$FILE/G0014092.doc, *last visited April 8, 2005.*

[31] Amended Complaint ¶ 25.

[32] *Id.* Ms. Albright later expressed regret for this statement, but insisted that sanctions were justified notwithstanding the "starvation" and "horrors" they caused. *Id.*

[33] *Iraq: Are Sanctions Collapsing?: Joint Hearing before the Senate Committee on Foreign Relations and the Senate Committee on Energy and Natural Resources*, 105th Cong., S. Hrg. 105-650, at 53-60 (1998).

deaths – legal under peremptory norms of international law (also known as "jus cogens"), norms from which civilized nations may not legally depart.

## STATEMENT OF THE CASE

1. The U.S. embargo of Iraq has its genesis in Executive Orders 12,722 and 12,724, which the first President Bush issued in response to the Iraqi occupation of Kuwait.[34] These orders prohibited certain economic transactions with Iraq but exempted "donations of articles intended to relieve human suffering, such as food, clothing, medicine and medical supplies intended strictly for medical purposes."[35]

Meanwhile, the UN Security Council issued Resolution 661,[36] which called for certain economic sanctions but also exempted "supplies intended strictly for medical purposes" and "payments exclusively for strictly medical or humanitarian purposes."[37] UN sanctions were limited to the purpose of securing Iraq's departure from Kuwait.[38]

On November 5, 1990, Congress enacted the Iraq Sanctions Act of 1990,[39] which approved President Bush's two executive orders.[40] The orders' exemption for humanitarian aid did not escape Congress's notice, for the Act expressly referred to them and the fact that they "were established by the United States pursuant to United

---

[34] Exec. Order No. 12,722, 55 F.R. 31803 (Aug. 2, 1990) (emphasis added), *reprinted in* 50 U.S.C. § 1701 note; Exec. Order No. 12,724, 55 F.R. 33089 (Aug. 9, 1990) (emphasis added), *reprinted in* 50 U.S.C. § 1701 note.

[35] Exec. Order 12,722, § 2(b); *see also* Exec. Order 12,724, § 2(b).

[36] S.C. Res. 661, U.N. SCOR, 2933rd mtg, U.N. Doc. S/RES/661 (1990), *available on-line at* http://www.un.org/Docs/scres/1990/scres90.htm, *last visited 4/8/05.*

[37] *Id.* §§ 3(c) & 4.

[38] *See supra* note 6.

[39] P.L. 101-513, *see* 50 U.S.C. § 1701 note.

[40] P.L. 101-513, § 586C(a).

Nations Security Council Resolution 661 ...."[41] Finally, the Act required that:

> [a]ny regulations issued after the date of enactment of this Act with respect to the economic sanctions imposed with respect to Iraq and Kuwait by the United States under Executive Orders Numbered 12722 and 12723 (August 2, 1990) and Executive Orders Numbered 12724 and 12725 (August 9, 1990) shall be submitted to the Congress before those regulations take effect.[42]

On January 18, 1991, the agency promulgated regulations that imposed trade sanctions on Iraq,[43] but the Federal Register contains no indication that the agency submitted its regulations to Congress beforehand as required.[44] Unlike Executive Orders 12,722 and 12,724 and Resolution 661, these regulations prohibited the unlicensed export of "donated foodstuffs in humanitarian circumstances, and donated supplies intended strictly for medical purposes."[45] Theoretically, the regulations allowed one to obtain a license, but they stated no criteria, and imposed no deadline, by which the agency would consider applications for such licenses.[46] The agency refused to answer a Freedom of Information Act request for information concerning its handling of license applications.[47] Together, the agency's regulations forbade U.S. citizens from either sending or bringing humanitarian aid to Iraq. The first, which the lower courts named the "Medicine Restriction," was 31 CFR § 575.205. The second,

---

[41] *Id.* § 586C(b).
[42] *Id.* § 586C(c)(1).
[43] 31 CFR Part 575; Amended Complaint ¶ 9.
[44] 56 Fed. Reg. 2113 (Jan. 18, 1991).
[45] Amended Complaint ¶ 11; 31 CFR § 575.205.
[46] Amended Complaint ¶ 11; 31 CFR § 575.205.
[47] Amended Complaint ¶ 44.

which the lower courts called the "Travel Ban," was 31 CFR § 575.207.

2. Mr. Sacks responded to the humanitarian catastrophe – wrought in significant part by the agency's implementation of the U.S. embargo – by bringing medicine and medical supplies to patients in Iraqi civilian hospitals on several occasions.[48] In November 1997, Mr. Sacks helped bring roughly $40,000 worth of medicine for this purpose.[49] His trip received national media coverage.[50] In December 1998, the agency responded with a written "Prepenalty Notice" that was jointly addressed to Mr. Sacks, several other individuals, and an organization called Voices in the Wilderness.[51]

"[Y]ou and Voices in the Wilderness ('VW')," the prepenalty notice began, "have engaged in certain prohibited transactions."[52] These violations, the notice continued, "concern your and VW's exportation of donated goods, including medical supplies and toys, to Iraq."[53] Count 6 of the notice charged: "Between on or about November 21-30, 1997 ... Sacks ... engaged in currency travel-related transactions to/from/within Iraq absent prior license or other authorization from OFAC. These currency transactions included, but are not limited to, the purchase of food, lodging, ground transportation, and incidentals."[54]

The agency proposed a $10,000 penalty[55] and invited a response from Mr. Sacks as to all of the charges, **including the charges against Voices**.[56] Mr. Sacks responded by admitting that he donated medical supplies,[57] explaining:

---

[48] Amended Complaint ¶ 13.

[49] *Id.*

[50] Amended Complaint ¶ 15.

[51] *Id.*

[52] Amended Complaint, Ex. 1, at 1.

[53] *Id.*

[54] Amended Complaint, Ex. 1, at 2.

[55] Amended Complaint, Ex. 1, at 3.

[56] *Id.*

[57] Amended Complaint ¶ 16.

> The decision to turn to civil disobedience to end sanctions, in public defiance of the laws you are entrusted with enforcing, was not a natural one for me.... In deciding to publicly violate sanctions, two events and two people played an important role for me. [One was] knowing that 150 years ago it was the highest law of the United States of America that runaway slaves from the South were legally "stolen property" of their owners. Anywhere in this country, an American was breaking the law to help such a slave escape via the "underground railroad." The people I greatly admire from this terrible era in our history were not law-abiding citizens, but those who broke the law to help slaves....[58]

Nearly four years later, the Agency sent Mr. Sacks a May 2002 "Penalty Notice"[59] that claimed: "You admitted the [Prepenalty] Notice's allegation in Count 6 **that you exported goods to Iraq absent prior OFAC approval** .... OFAC notes that you have admitted to Count 6 alleged in the Notice. . . ."[60] Based on this admission, the agency found that Mr. Sacks had "violated the Regulations as alleged in Count 6 of the Notice" and imposed a $10,000 penalty.[61]

In August 2003, an organization named Ocwen Federal Bank wrote Mr. Sacks to advise that the agency had retained it to collect the penalty.[62] Meanwhile, the agency sued Voices to collect a penalty for exporting medical supplies to Iraq.[63] The district court in that case noted that Voices "is an unincorporated association of individuals," that "Voices delegations delivered medical supplies to Iraq"

---

[58] Amended Complaint ¶ 16.
[59] Amended Complaint ¶ 41.
[60] Amended Complaint, Ex. 2, at 1 (emphasis added).
[61] Amended Complaint, Ex. 2, at 2.
[62] Amended Complaint ¶¶ 46 & 47.
[63] *Id.*

without obtaining a license,[64] and that Voices' website was www.vitw.us/who_we_are.[65] That website, in turn, identifies Mr. Sacks as a "representative" of Voices. In addition, the agency's motion to dismiss warned of further enforcement efforts, stating that it "reserve[d] the right" to "act[] in response to Plaintiff's eight other trips to Iraq."[66]

Thus, Mr. Sacks was faced with a three-fold threat: (1) the agency's penalty based on Mr. Sacks's admission that he "exported goods to Iraq"; (2) a possible agency attempt to collect its judgment against Voices from Mr. Sacks, a judgment premised on Voices' export of medicine to Iraq; and (3) the agency's threat to seek further penalties from Mr. Sacks for violating its ban on humanitarian exports. This suit followed.

3. Mr. Sacks filed this action on January 14, 2004 and amended his complaint shortly thereafter. He challenged the agency's restriction on humanitarian donations of medicine and other medical supplies, and its ban on travel for the purpose of making such donations.

The district court had subject matter jurisdiction of the action under 28 U.S.C. § 1331 (as it arose under the laws of the United States); 28 U.S.C. § 1337 (as it arose under an Act of Congress regulating commerce), under 28 U.S.C. § 1346(a)(2) (as it was an action against the United States founded upon federal law that involved more than $10,000), and under 28 U.S.C. § 2461(a) (as the court had jurisdiction of the agency's underlying claims).

The agency moved to dismiss under Fed. R. Civ. P. 12(b)(6). After Mr. Sacks served discovery requests and initial disclosures, the agency requested, and the district court granted, a stay of discovery and initial disclosures until the agency's motion to dismiss was decided.[67]

---

[64] *Office of Foreign Assets Control v. Voices in the Wilderness*, No. 03-1356 (JDB) (D.D.C. July 9, 2004), at 2; *see also* Amended Complaint ¶ 46.

[65] *Office of Foreign Assets Control v. Voices in the Wilderness*, at 2.

[66] Motion to Dismiss, at 5 n.4.

[67] A copy of the protective order staying discovery appears in the Appendix.

The district court granted the agency's motion to dismiss in part. The district court held that the agency's regulations required it to refer its civil penalty to the Justice Department for enforcement in a civil proceeding rather than collect its fine extra-judicially. (The Ninth Circuit subsequently affirmed this ruling.)

But the district court ruled that the agency had not exceeded its authority by prohibiting U.S. citizens from bringing or sending humanitarian aid to Iraq. After acknowledging that Mr. Sacks "present[ed] a compelling argument" that the agency transgressed statutory limits, the court concluded that the Iraq Sanctions Act authorized those regulations,[68] even if the Act ran counter to international treaties or customary international law. The court went so far as to hold that the Geneva Convention "is not binding on the United States."[69]

Mr. Sacks timely appealed the district court's decision and the agency timely cross-appealed. The United States Court of Appeals for the Ninth Circuit affirmed the district court's dismissal, although on different grounds. Pertinent to this petition, the Ninth Circuit held that Mr. Sacks lacked standing to challenge the agency's prohibition on humanitarian exports of food and medical supplies to Iraq. While agreeing that Mr. Sacks satisfied all other elements of standing and ripeness,[70] the court concluded that his "fear of prosecution runs aground on the government's decision to charge and penalize him for only the violation of the Travel Ban and not for the Medicine Restrictions violation."[71]

The Ninth Circuit acknowledged that the agency's penalty notice "described [Mr. Sacks's] prior admission ambiguously" and that the penalty notice was "confusing."[72] Nonetheless, without the benefit of facts that might bear on

---

[68] Order at 5.
[69] *Id.* at 7.
[70] 466 F.3d 764, 2006 U.S. App. LEXIS 25294, at *21.
[71] *Id.* at *21-*22.
[72] *Id.* at *11 & *17.

the agency's intent, the court made the factual determination – on a rule 12(b)(6) motion – that "Sacks was not penalized for violating the Medicine Restrictions"[73] and that the agency decided "to charge and penalize him for only the violation of the Travel Ban and not for the Medicine Restrictions violation ... when it was fully aware he had also violated the Medicine Restrictions."

Based on these factual findings, the Ninth Circuit concluded that Mr. Sacks had not demonstrated an actual injury. Going further, the court concluded that Mr. Sacks could not even demonstrate a threat of future injury. In the Ninth Circuit's eyes, the agency's conduct "indicate[d] that the government does **not** intend to penalize him for any of his numerous violations of the Medicine Restrictions."[74] The court next went entirely outside the confines of the complaint, found that the agency had failed to pursue additional fines against Mr. Sacks, and concluded that this was "a strong indication of its lack of intent to do so in the future."[75] The court also deemed insignificant the agency's pursuit of fines against Voices, and its reservation of its right to impose additional penalties on Mr. Sacks.

Mr. Sacks now petitions for a writ of certiorari.

## REASONS FOR GRANTING THE WRIT

This case raises important issues regarding the scope of executive power to punish U.S. citizens in violation of Congressional statutes and international law. If left uncorrected, moreover, individuals threatened with punishment for voicing their opposition to illegal conduct by the executive or acting for humanitarian purposes could lose the right to judicial review of the penalty's validity through tactically worded penalty notices. As set forth in the following sections, the case also presents a unique

---

[73] *Id.* at *18.

[74] *Id.* at *22-*23 (emphasis in original).

[75] *Id.* at *24.

opportunity to address these issues without undue interference with ongoing foreign policy initiatives of the executive branch.

## I. The Ninth Circuit's Erroneous Ruling on Standing Will Prevent Judicial Scrutiny of Regulations like Those at Issue Here

The Ninth Circuit narrowly construed this Court's standing jurisprudence in order to deny Mr. Sacks' standing to challenge the agency's restriction on humanitarian donations of food and medicine (while recognizing his standing to challenge the travel ban). By doing so, the Ninth Circuit has done more than simply depart from established law. Rather, under the Ninth Circuit's ruling, it is difficult to conceive how the agency's authority to directly restrict humanitarian donations of food and medicine could ever be subjected to review. Under the Ninth Circuit's analysis, the agency may indirectly preclude all humanitarian exports through a travel ban, perpetually rendering its restrictions on humanitarian exports unreviewable.

Not only that, the Ninth Circuit's ruling on Mr. Sacks's standing is wrong. Mr. Sacks has Article III standing to challenge the agency's restriction on medical exports if three elements are present: (1) injury in fact to Mr. Sacks; (2) causation, i.e., a fairly traceable connection between Mr. Sacks' injury and the agency's restriction on medical exports; and (3) redressability, i.e., a likelihood that the relief Mr. Sacks requests will redress the injuries he alleges.[76]

At this stage of the proceedings, a motion directed to the pleadings, general factual allegations in support of standing are sufficient.[77] And when standing is challenged

---

[76] *E.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[77] *Steel Co.*, 523 U.S. at 105; *Lujan*, 504 U.S. at 561.

on the basis of the pleadings, the court must "accept as true all material allegations of the complaint, and ... construe the complaint in favor of the complaining party."[78]

As will be seen, the Ninth Circuit failed to apply these rules. Instead, it construed the complaint against Mr. Sacks, looked to facts outside the complaint, including facts that took place after the complaint was filed and, based on this review, concluded that Mr. Sacks lacked standing and that his claims were unripe.

### A. Injury in Fact

A plaintiff has standing to challenge allegedly illegal action if he or she faces "some threatened or actual injury resulting from the putatively illegal action."[79] Here, Mr. Sacks faces both actual and threatened prosecution under the agency's medicine restriction.

Mr. Sacks was fined, the agency's penalty notice claimed, because he "admitted the [Prepenalty] Notice's allegation in Count 6 **that you exported goods to Iraq** absent prior OFAC approval."[80] This claim followed a prepenalty notice directed jointly to Voices and him (making clear that the agency did not view Mr. Sacks as any ordinary dues-paying member of that organization). The prepenalty notice claimed that "you and Voices in the Wilderness ('VW') have engaged in certain prohibited transactions"[81] which "**concern[ed] your and VW's exportation of donated goods, including medical supplies** and toys, to Iraq."[82]

---

[78] *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988) (*quoting Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

[79] *E.g., Warth*, 422 U.S. at 490; *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973); *see also Heckler v. Mathews*, 465 U.S. 728, 736 (1984) ("actual or threatened injury" is required).

[80] Amended Complaint, Ex. 2, at 1 (emphasis added).

[81] Amended Complaint, Ex. 1, at 1.

[82] *Id.*

As previously mentioned, the Ninth Circuit dismissed the language of the penalty notice as ambiguous and "confusing." It then resolved the ambiguity against Mr. Sacks and concluded that Mr. Sacks had not been pursued or punished for exporting medical goods. But the court did not stop there. It went further and found that the agency's conduct did not suggest that the threat of future enforcement of the medicine restriction was anything more than conjectural.

These rulings do not comport with this Court's jurisprudence regarding standing. The complaint, construed in Mr. Sacks' favor, alleges that he was fined because he "exported goods to Iraq." The Ninth Circuit had no license to resolve factual issues on a Rule 12(b)(6) motion, which is precisely what it did when it found ambiguity in the penalty notice. A proper reading of the complaint reveals an actual injury in fact – a $10,000 civil penalty – imposed because he admitted that he "exported goods to Iraq." This satisfied the first prong of Article III's tripartite standing requirement.

The Ninth Circuit compounded its error by dismissing the threat of future prosecution as insufficiently concrete to satisfy Article III. But the combination of the agency's enforcement actions against Voices and Mr. Sacks plainly raises, at least on the pleadings, a credible threat of future prosecution. In *Babbitt v. United Farm Workers*[83], this Court articulated the difference between prosecutorial threats that are sufficient to confer standing and those that are not:

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required

[83] 442 U.S. 289 (1979).

> to await and undergo a criminal prosecution as the sole means of seeking relief. But persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs. When plaintiffs do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible, they do not allege a dispute susceptible to resolution by a federal court.[84]

Here, as the Ninth Circuit acknowledged, Mr. Sacks had done more than merely assert an intention to engage in conduct that violated the medicine restriction. He has actually done so on several occasions. The question was therefore reduced to whether the threat of prosecution was something other than remote or speculative.

This Court has, from time to time, dismissed a threat of future prosecution as insufficient. In *Poe v. Ullman,*[85] this Court dismissed the threat of prosecution under a statute as insignificant where the statute had never been enforced in nearly a century (save for a single test case to establish its constitutionality and then not to the point that anyone was punished). In *O'Shea v. Littleton,* 414 U.S. 488 (1974), the threat of future abusive or discriminatory prosecution was dismissed where the plaintiffs did not allege any specific threats against them, where they did not challenge the validity of the any of the laws under which they might be prosecuted, and where the court "assume[d] that [plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by [defendants]." Here, of course, the regulations at issue are being enforced, and enforced against an association of

---

[84] 442 U.S. at 298-99 (citations and quotations omitted).
[85] 367 U.S. 497 (1961).

which Mr. Sacks is a member in connection with acts Mr. Sacks committed.

The threats Mr. Sacks faces are akin to those presented in *Doe v. Bolton*, 410 U.S. 179 (1973). There, the Court upheld the standing of physicians to challenge a law proscribing doctor assistance at most abortions where the statute was "recent and not moribund" and the Court was informed at oral argument that physicians had been prosecuted under it.

The threats here are certainly more concrete than those found to confer standing in *Pennell*. There, this Court ruled that an association of landlords had standing to challenge a rent control ordinance that limited their right to raise the rent where it would impose a hardship on the tenant and subjected landlords who violated the ordinance to civil and criminal penalties. It was enough, this Court ruled, that the complaint stated that the plaintiffs were "subject to the ordinance" and counsel stated, during oral argument, that most landlords had hardship tenants.[86]

Here, in contrast, the agency has assessed one civil penalty against Mr. Sacks because he admitted "exported goods to Iraq." It alleged – in a prepenalty notice sent to him as well as Voices – that "you and [Voices] engaged in certain prohibited transactions" including "your and [Voices'] exportation of donated goods, including medical supplies." Having identified Mr. Sacks as one of the individuals involved in this exportation, the agency sued Voices and pursued the claim to judgment. There is every reason to believe, on this record, that the agency intends to enforce its restriction on humanitarian donations and that Mr. Sacks is one of small handful of individuals in whom the agency is particularly interested in penalizing. The agency never disclaimed interest in doing so, warning the district court that it "reserve[d]he right" to "act[ ] in response to Plaintiff's eight other trips to Iraq."[87]

---

[86] *Pennell*, 485 U.S. at 7-8.

[87] Motion to Dismiss at 5, n.4.

Surely this was enough to move Mr. Sacks's claim past the pleading stage. To the extent there were doubts about the agency's enforcement philosophy, resolving those doubts on a motion to dismiss was improper. Factual questions regarding the agency's enforcements should have awaited discovery and development of the factual record.

In short, this Court's teaching in *Lujan v. Defenders of Wildlife* applies here:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.[88]

Here, Mr. Sacks himself has made humanitarian donations of medicine to civilians in Iraq, something the agency's regulations prohibit. The agency has accused him of exporting goods to Iraq and has fined him for admitting he did so. And it has reduced its claim against Voices to judgment, a claim that arises from the same conduct alleged in the prepenalty notice, conduct in which Mr. Sacks is alleged to have participated. For all these reasons, Mr. Sacks has alleged both a past injury as well as threatened future injuries. These satisfy the first element of standing.

### B. Causation and Redressability

---

[88] *Lujan*, 504 U.S. at 561-62.

Before the Ninth Circuit, the agency did not contend that the second and third prongs of Article III standing were absent and the Ninth Circuit did not so rule.

Causation simply requires "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant."[89] Here, the agency's own penalty and prepenalty notices trace the connection between the agency's restriction on medical exports and the pending civil penalty against Mr. Sacks. These notices demonstrate that the agency imposed the penalty because Mr. Sacks "exported goods to Iraq."

This Court's decision in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*[90] shows that courts may and should tolerate fairly attenuated causal chains, ones that might not satisfy traditional notions of causation under tort law. There, neighbors of a nuclear power plant under construction challenged the constitutionality of a statute that limited the liability of such plants. This Supreme Court found two injuries that conferred standing: thermal pollution of a nearby lake and non-natural radiation from the plant, neither of which was directly caused by the liability limitation at issue. Nor was the plaintiffs' alleged injury caused by the (alleged) illegal aspects of the defendant's behavior.[91] To the contrary, as a respected treatise notes, the plaintiffs' injuries arose from actions that were entirely lawful: the operation of a properly licensed generating plant.[92] But because the plant would not be built in the absence of a liability limitation, this Court concluded that the plaintiffs had satisfied the causation element of standing.

Redressability is likewise satisfied. It is fair to say that generally speaking, redressability only presents a problem where a third party, not the defendant, is the direct cause

---

[89] *Steel Co.*, 423 U.S. at 103 (citations omitted).

[90] 438 U.S. 59 (1978).

[91] CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.5, at 879 (2004 supp.

[92] *Id.*

of the plaintiff's injury.[93] In those instances, an order directed to the defendant may not redress the problem, because there is no guarantee that the third party will change its conduct in response to the order.[94] Here, of course, the agency, and not some third party, is the direct cause of Mr. Sacks's injury. An injunction prohibiting the agency from enforcing its regulatory prohibition against humanitarian exports of food and medicine would redress Mr. Sacks's injury.

Article III standing, therefore, was present. The Ninth Circuit should have proceeded to addresses the merits of Mr. Sacks's challenge to the medicine restriction, just as the district court did. Having done so, the Ninth Circuit should have reached a different conclusion than the district court, one that was not premised upon the determination that Geneva Convention "is not binding on the United States" and similar observations.[95]

## II. A Prohibition on Humanitarian Donations Violates International Law That Congress Has Not Abrogated

The Ninth Circuit's ruling left unresolved the question of the executive's authority to punish U.S. citizens who try to relieve human suffering with humanitarian aid. The scope of the executive's power, especially in the face of clear and contrary legislation from Congress, is an important one worthy of this Court's consideration.

This case provides an excellent vehicle for addressing that issue because the Court may address the issue without

---

[93] *E.g., Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973) (suit by unwed mother to force state to prosecute father who refused to pay child support); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) (suit by indigent persons challenging IRS elimination of requirement that hospitals provide services to indigents to extent of financial ability to qualify as charitable organization).

[94] *Id.*

[95] Order at 7.

concern for interference with either the political processes or ongoing foreign policy initiatives. This is so because the embargo on Iraq was lifted after the fall of the Saddam Hussein regime in 2003, without mooting the issues, since the executive reserves the right to punish past violations.[96]

As the district court noted below, the agency's embargo on Iraq is but one of over a dozen sets of regulations under which the agency has sought to restrict trade with foreign states.[97] Thus, issues concerning the proper use and scope of such restrictions are likely to recur. As the following sections show, the agency lacks the authority to impose the regulatory embargo that it did.

### A. International Law Forbids the Deliberate, Mass Starvation of Children and Other Civilians

The prohibition against the deliberate starvation of civilian children is a peremptory norm, or "jus cogens," which means that it cannot be overruled by any other law or local custom.[98] The notion that a state may not intentionally target children and civilians during peacetime is not codified in a treaty. Rather, it is derived from treaty and international custom. Customary international law, like international law embodied treaties, is part of our law.[99]

---

[96] *See* Executive Order 13350, 69 Fed. Reg. 46055 (July 30, 2004).

[97] Order at 9-10.

[98] The concept of peremptory norms finds expression in a number of international legal sources. Among these is Article 53 of the Vienna Convention on the Law of Treaties, which declares void any treaty that "conflicts with a peremptory norm of general international law." Article 53 defines a peremptory norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, *done on* May 23, 1969, art. 53, 1155 U.N.T.S. 331.

[99] *The Paquete-Habana*, 175 U.S. 677, 700 (1900)

A number of international agreements evidence the international community's consensus that the intentional mass killing of civilians, especially children, is a crime. In the modern era, these begin with the 1948 Universal Declaration of Human Rights.[100] Article 25(1) of the Universal Declaration states:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services ....

Article 25(2) provides that "[m]otherhood and childhood are entitled to special care and assistance." Civilized nations thus recognize that depriving people – particularly mothers, infants, and young children – of "food, clothing, housing and medical care and necessary social services" constitutes a deprivation of their human rights.

Although the Declaration itself does not have the force of a treaty under U.S. domestic law, it provides evidence of peremptory norms and customary international law, i.e., law that has not been codified in a treaty.

Moreover, many of the rights set forth in the Declaration were subsequently enshrined in other treaties. One is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War[101] entered into force in 1956. Article 23 of the Geneva Convention states that even during war, parties to the treaty:

> shall allow the free passage of all consignments of medical and hospital stores ... intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children

---

[100] GA Res. 217A (III), U.N. Doc A/810 at 71 (1948).

[101] Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

> under fifteen, expectant mothers and maternity cases.

Another is the Convention on the Prevention and Punishment of the Crime of Genocide,[102] which entered into force in 1951. This Convention, drafted in response to Nazi atrocities,[103] largely embodied the principles of law that were applied during the post-war Nuremberg trials. The Senate ratified the Convention in 1988. Article II of the Convention defines genocide to include killing or causing serious bodily or mental harm to members of a group as well as deliberately inflicting conditions of life calculated to bring about the partial or total physical destruction of the group.

Finally, Article 24 of the Convention on the Rights of the Child[104] "recognize[s] the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health."[105] The Convention states that nations "shall strive to ensure that no child is deprived of his or her right of access to such health care services." Accordingly, the Convention requires countries to:

> take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into

---

[102] Dec. 9, 1948, 78 U.N.T.S. 277.

[103] S. REP. NO. 99-2, pt. I, *reprinted in* 28 I.L.M. 754, 762 (1989).

[104] Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

[105] *Id.*

consideration the dangers and risks of environmental pollution; [and] (d) To ensure appropriate pre-natal and post-natal health care for mothers.[106]

The United States admittedly has not ratified the Convention on the Rights of the Child (although not because it expressed an interest in exposing children to the hazards of international conflict). It has, however, ratified the "Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict."[107] The preamble to that Protocol condemns "the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places generally having a significant presence of children, such as schools and hospitals."[108] The Protocol accordingly increases the strictures against the military recruitment of children.

These treaties and international documents embody or reflect certain principles of international law, most notably the principle is that one state may not carry out its foreign policy objectives vis-à-vis another state by intentionally targeting and killing the civilians, especially children, of the other state. Under the Supremacy Clause, these principles are the highest law of the land.[109]

In other sanctions-related contexts, Congress has enacted legislation that avoids conflict with these principles. Thus, the International Emergency Economic Powers Act ("IEEPA") § 203(b) contains the following restrictions on executive authority:

---

[106] *Id.*

[107] UNITED STATES DEPT. OF STATE, TREATIES IN FORCE (2006), at 389-90.

[108] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *done on* May 25, 2000, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000).

[109] U.S. CONST. Art. 6.

> The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly --
>
> (2) donations ... of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering ... ; or
>
> (4) any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses and acquisition of goods or services for personal use, and arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages.[110]

Nonetheless, before the Court of Appeals, the agency contended that two statutes each abrogated these peremptory norms of international law and authorized its restrictions on humanitarian donations. This brings into play this Court's admonition, in an opinion by Chief Justice Marshall, that "a statute ought never to be construed to violate the law of nations, if any other possible construction remains."[111] Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."[112] And "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[113]

---

[110] Section 203(b) of IEEPA is codified at 50 U.S.C. § 1702(b).

[111] *Murray v. Charming Betsy*, 6 U.S. 64, 118 (1804); *see also Weinberger v. Rossi*, 456 U.S. 25, 32-33 (1982) (narrowly interpreting a federal statute in deference to an executive agreement between the United States and the Philippines); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (using a definition from an international treaty to interpret the Refuge Act of 1980); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

[112] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

[113] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J. concurring). This assumes, of course, that Congress has the

## B. The UN Participation Act Does Not Authorize an Embargo on Humanitarian Aid

The first statute the agency cited to support its restriction on humanitarian aid was the UN Participation Act. That statute authorizes the executive branch to regulate trade with other countries when a UN Security Council resolution calls upon the United States to do so. Specifically, 22 U.S.C. § 287c(a) states that "whenever the United States is called upon by the Security Council to apply measures which said Council has decided ... are to be employed to give effect to its decisions ..., the president may, **to the extent necessary to apply such measures**, regulate or prohibit ... economic relations."[114] Thus, UN Participation Act only authorizes the agency to regulate or prohibit economic relations "to the extent necessary to apply" Security Council measures.

Here, the pertinent Security Council resolution is Resolution 661. But that resolution did not call for an embargo on medicine and medical supplies. To the contrary, it exempted "supplies intended strictly for medical purposes" and "payments exclusively for strictly medical or humanitarian purposes" from the embargo. Nor was the purpose of Resolution 661 unlimited. Its self-proclaimed goal was "to bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait."[115] Nothing in the resolution purports to authorize an embargo until Saddam Hussein was removed from power. Because the UN Security Council **rejected** an

---

Constitutional authority to act, which it plainly does when it comes to embargoes on foreign countries. Article 8, section 3 of the federal Constitution gives Congress the power "To regulate Commerce with foreign Nations."

[114] 22 U.S.C. § 287c(a) (emphasis added).

[115] See, supra, note 6.

embargo on humanitarian supplies, the UNPA does not authorize the imposition of such an embargo.

Hence, the agency's medicine restriction falls to extent that it is applied to implement such an embargo. The same is true of the travel ban. While the President has the authority to limit international travel, he is bound by statutory limits.

### C. The Iraq Sanctions Act of 1990 Does Not Authorize an Embargo on Humanitarian Aid

The agency also claimed that the Iraq Sanctions Act of 1990 "ratified" its regulations.[116] But the Act could not have ratified those regulations, since they were promulgated after the Act's November 5, 1990 passage.[117] The Act admittedly approved President Bush's earlier executive orders by name, but noted that these orders exempted humanitarian aid from their scope.[118] Perhaps most important, the Act required any regulations issued after it took effect to be submitted to Congress before taking effect.[119] The agency did not follow this Congressional directive. Nothing in the Act, therefore, can be read to approve the agency's regulations. This conclusion extends both to the medicine restriction and, to the extent employed to prevent humanitarian aid from reaching Iraq, the travel ban as well.

## III. Conclusion

The agency has pursued Mr. Sacks for violating its restrictions on humanitarian aid to the people of Iraq. Mr. Sacks has standing to challenge the agency's restrictions.

---

[116] P.L. 101-513 *see* 50 U.S.C. § 1701 note.

[117] *See* 56 Fed. Reg. 2113 (Jan. 18, 1991).

[118] P.L. 101-513, § 586C(a) & (b).

[119] *Id.* § 586C(c)(1).

Those restrictions contravene the highest principles of the law of nations, principles Congress has never abrogated. Congress likewise has never authorized the agency's ban on humanitarian aid. For all these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Donald B. Scaramastra
*Counsel of Record*
Gary D. Swearingen
GARVEY SCHUBERT BARER
Eighteenth Floor
1191 Second Avenue
Seattle, WA 98101-2939
(206) 464-3939

January 8, 2007